“Deference to the Administration in Judicial Review”

A Questionnaire

For the preparation of national reports to be presented at 2018 Congress of International Academy of Comparative Law (AIDC/IACL), Fukuoka, Japan

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It is my honor to be assigned as the general rapporteur. I am not the initial proposer of this interesting and important topic, and therefore my comprehension of it might slightly differ from the originator’s. As general rapporteur, I will do my best to comply with the original intent, to work out a plan / questionnaire that best suits the situation of most national reporters¹, and to meet the expectations of the IACL and national reporters. I am delighted that we have been given this precious opportunity to work together on such an important project.

A side note: this topic was first proposed by Professor John Reitz, Edward L. Carmody Professor of Law, University of Iowa College of Law. We corresponded in the process of preparing this questionnaire. I am grateful for his valuable advice and constructive suggestions.

Introduction: Concept and Definition

The topic “Deference to the Administration in Judicial Review” has been identified and accepted as one of the general topics for plenary discussion by the IACL.

A literature review shows that there are numerous discussions on this topic and related topics in major common law jurisdictions, and in particular in the US, Canada, and Australia.¹

¹ See, for example:
Deference and Due Process, 129 HARV. L. REV. 1890 (2016);
Transatlantic Perspective on Judicial Deference in Administrative Law, Columbia Journal of European Law Spring, 2016 22 Colum. J. Eur. L. 275;
Judicial Deference and Regulatory Preemption by Federal Agencies, Tulane Law Review May, 2010 84 Tul. L. Rev. 1233;
“Deference”, a concept which originated in North American judicial practice, has gradually come into consideration and/or been accepted by other jurisdictions. In the seminal case of *Dunsmuir v New Brunswick*, the term deference was defined as follows:\(^2\)

Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference ‘is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers’ ... Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.

Alan Freckelton, a Canadian scholar, also wrote:\(^3\)

Deference is an approach to judicial review taken by the courts, and effectively acts as a form of reconciliation between the rule of law and Parliamentary supremacy. That is, deference to administrative decision-makers balances the courts’ constitutional requirement to review the decisions of administrative decision-makers to ensure that they are both constitutionally valid and within the decision-maker’s power to make, and the

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2 [2008] 1 SCR 190 at paragraph 47.
power of the Parliament to allocate certain decision-making powers to persons authorised by or bodies created by statute.

The concept of deference can have various connotations under different circumstances, and sound differently in different legal systems and jurisdictions; by legal system, I mean basically common law, civil law, and mixed system. There may / should be different legal doctrines and theories, and different practices of the court.

**Objectives of the Project**

The first and primary objective is to produce a thorough national report on judicial deference to administrative decision makers of the country concerned.

The second objective is to enable a deep, structured, and comparative discussion of the topic at the 2018 congress based on all the national reports and discussants’ on-the-spot observations.

Lastly, as we have been given to understand, there will be a special volume on the topic to be included in “lus comparatum – Global studies in comparative law” to be published by Springer. So a well-formulated and structured report in the form of an academic paper would greatly facilitate the preparation of this volume. In connection with this, I would like to advise national reporters to follow from day one of your report writing the Springer manuscript guidelines regarding citations and referencing (see: https://www.springer.com/gp/authors-editors/book-authors-editors/book-manuscript-guidelines)

The report can be written in English and/or French.

**Proposed Structure**

Since all national reporters are also experienced writers and experts, I only need to give an indication as to the structure of the report, while leaving the adoption of methodology in the hands of the reporters for them to decide; this largely depends on legal systems, legal training, and practical writing needs. It can be a normative investigation, a doctrinal discussion, a case study, or most likely, a mixture of these.

The report should first include an introduction to the background of your jurisdiction and the salient features of the national system of judicial review. A definition of the concept “deference” or “judicial deference” here is also appropriate. Should there be no equivalent concept in your language and legal system, national reporters can feel free to adopt the one scholars of their jurisdictions use to describe the deference-like law and practice.

Then follows the main body of the report, focusing on the law, judicial review system, seminal / leading / landmark national cases establishing judicial deference, standard / grounds of review in deferential cases adopted by the national courts, and appropriate doctrines of administrative law developed to accommodate it.
[A reporter specialized in the EU is welcome to discuss judicial deference situations in EU courts.]

In the conclusion, a general observation of the national system concerned is a must. The reporter can further sum up some salient features or good practice of the national system, experiences that deserve attention of others, and difficulties national courts has been faced with. A brief comparison between the national system and other systems within your expertise are also welcome.

**Main Questions/Issues**

**Introduction to national system**

In some major common law jurisdictions such as the United States, it can be observed that, of all the areas in administrative law, one of the more fertile for published scholarship and judicial opinions is the notion of deference,\(^4\) while in civil law / continental law jurisdictions, the notional development of deference has been conditioned by the existing administrative court / tribunal system and the dynamics of executive-judicial branches. Even among the same civil law family, situations vary from one another; some jurisdictions maintain an independent administrative court system, and some others don’t have such an independent court but have an administrative chamber within the general court.

All national reports should first include an introduction to the national legal (and political) system, and address the particularities which affect the making and operation of judicial deference. This will pave the way for our further understanding and reflection of the topic and for comparison.

In addition, the topic of judicial deference can be examined through the lens of constitutionalism and the separation of powers.

**Questions concerning judicial deference**

In the context of deference, more questions are to be addressed:

(i) When, why, and how much should reviewing courts defer to administrative agency decisions?

(ii) Should it matter what type of agency action is being reviewed?

(iii) What standard / approach / grounds should courts adopt when reviewing an administrative decision? How are these grounds / standards such as reasonableness, or proportionality, applied in the courtroom?

(iv) In relation to the above, reporters are invited to, if applicable: (a) probe the treatment of fact finding, especially that based on science and technology; (b) probe the interpretation of words that could be seen as delegations of

\[^4\] http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1071&context=naalj
policy-making power to the administrative officials, especially vague or general expressions that lack a precise meaning, and (c) probe the use of proportionality review which could be an important topic about deference, even in countries who do not think that their courts generally defer to administrators;

(v) Why in this jurisdiction, the courts tend to be active and more engaging (judicial activism), while in others the courts prefer to adopt deferential approach (judicial restraint)? Any political consideration?

(vi) In relation to the above, where are the limits of judicial review?

(vii) Can we identify a given national system as “model” that can be applied beyond jurisdiction, and on what basis?

I understand that the report from a given country may not be able to cover every single issue of the above, however national reporters are invited to address most of them. They are also reminded to highlight not only normative provisions, but also landmark cases that establish deferential practice.

**Comparison and Lessons to Learn**

To the extent that is possible, national reporters are welcome to make comparisons between her/his national system and the system/s s/he is familiar with. However this part is not a must.

National reporters can sum up good practice and some lessons from the national systems for others’ reference.

**Schedule**

I would like to receive the reports [on or before 30 October 2017, at the latest](#). I believe we have sufficient time to produce a quality report.

During this process, should national reporters have any questions or enquiries, please feel free to communicate with me via email: [lwzhugb@cityu.edu.hk](mailto:lwzhugb@cityu.edu.hk). I promise to answer them as soon as I can.